

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER A. SPALLUTO
and ACCESS WITH SUCCESS, INC.
Plaintiffs

Vs.

HDP, INC.,
Defendant

CIVIL ACTION NO.:
05-CV-10385-EFH

DEFENDANT HDP, INC.'s SECOND MOTION
TO DISMISS THE PLAINTIFFS' COMPLAINT FOR
FAILURE TO COMPLY WITH THE COURT'S
DISCOVERY ORDER

Defendant HDP, Inc. ("HDP") hereby moves, pursuant to F. R. C. P. 37 (b)(2) that the Court dismiss the complaint of the plaintiffs, Peter A. Spalluto ("Spalluto") and Access With Success, Inc. ("Access"), for failure to appear at their respective depositions, again, despite the previous orders of this Court.

In support of this motion, defendant says that on or about February 28, 2008, its counsel re-noticed the depositions of both plaintiffs for 10:00 AM (Access with Success, Inc.) and 12:00 PM (Spalluto) on April 16, 2008.

On March 26, 2008, Plaintiffs' counsel wrote to defendant's counsel to inform that Mr. Spalluto would not be available for a deposition until the end of July or the beginning of August. By return correspondence, the undersigned advised plaintiffs' counsel that he could not agree to postpone the deposition of Mr. Spalluto until then. Absent an agreement to conduct the depositions on a date prior to the end of July, undersigned counsel intended to conduct the depositions on the date for which they were noticed.

During the afternoon of April 15, 2008, Plaintiffs' counsel served and electronically filed a motion for a protective order, asserting that Mr. Spalluto could not travel to Massachusetts for his deposition. In an opposition served and filed later that afternoon, defense counsel pointed out that between January 1, 2000 and April 14, 2008, according to P.A.C.E.R. records, Mr. Spalluto filed or caused to be filed one hundred, forty-one (141) civil actions in federal courts in at least seven states. In the past four years, he has brought eight actions in the US District Court for the District of Massachusetts alone. By inference, Mr. Spalluto appears to be capable of 'getting around'.

The depositions were to commence at 10:00 AM on April 16. Neither a spokesperson for the corporate plaintiff, nor Mr. Spalluto, nor their counsel appeared at that time. Undersigned counsel made a record of communications and events leading to the depositions, and adjourned them at approximately 10:17 AM on April 16, 2008. Counsel learned at about 11:30 AM that morning that the Court had denied the plaintiffs' motion for a protective order. A copy of the transcript of the depositions, with the exhibits thereto is attached to the memorandum accompanying this motion as Exhibit A.

The plaintiffs have previously failed to appear at their respective depositions, despite an earlier order of this Court compelling them to do so.

In support of its motion, the defendant further relies upon the memorandum of law filed herewith, and the exhibits attached thereto.

Wherefore, the defendant moves that the complaint be dismissed forthwith and with prejudice and costs.

Respectfully submitted,
HDP, INC.
By its Attorney,

/s/ Brian J. McMenimen

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Dated: April 30, 2008

CERTIFICATE OF COUNSEL

I, Brian McMenimen, attorney for the defendant, HDP, Inc., certify that counsel for the plaintiffs and counsel for the defendant have conferred to attempted to resolve or narrow the scope of the issue presented in this motion.

/s/ Brian J. McMenimen

Brian J. McMenimen

CERTIFICATE OF SERVICE

I hereby certify that this document filed through ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on April 30, 2008.

/s/ Brian J. McMenimen

Brian J. McMenimen